P. O. Box 9000-PD
Bartow, FL 33831

June 28, 2001

Mr. Alvin Leroy Morton
Inmate No. 309066
Union Correctional Institution
P. O. Box 221
Raiford, FL 32083

IN THE SUPREME COURT OF FLORIDA

ALVIN LEROY MORTON, :

Appellant, :

vs. : Case No. SC95171

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

PAUL C. HELM
Assistant Public Defender
FLORIDA BAR NUMBER O229687

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, Alvin Leroy Morton, in reply to the Answer Brief of Appellee, the State of Florida. Appellant will rely upon his argument in his Initial Brief with regard to Issue IV.

References to the record on appeal are designated by a Roman numeral for the volume number followed by the page number. References to the supplemental record are designated by SR and the page number. References to the second supplemental record are designated by 2dSR and the page number. References to the Appendix to the Initial Brief of Appellant are designated by A and the page number.

ARGUMENT

ISSUE I

THE RESENTENCING JUDGE ERRED BY ADOPTING THE FACTS FOUND BY THE PRIOR SENTENCING JUDGE REGARDING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Appellee mistakenly asserts that appellant's claim is speculative and not based upon any particular language or statement from Judge Beach, the resentencing judge. Answer Brief, p. 6. Appellant's claim is based upon the fact that most of Judge Beach's language in his findings of fact on aggravating and mitigating circumstances [I 152-61; A 8-17] is identical to the language used by the original sentencing judge, Judge Villanti, in his findings of fact on aggravating and mitigating circumstances.[1] [A 18-28] Appellant concedes that there are some differences in Judge Beach's findings, but it is obvious from comparing the two sentencing orders that Judge Beach copied most of Judge Villanti's findings verbatim.

There are two basic reasons why this Court should find that it was reversible error for Judge Beach to copy the prior findings of Judge Villanti: First, a resentencing proceeding before a new judge and jury must "proceed in every respect as an entirely new proceeding." Wike v. State, 698 So. 2d 817, 821 (Fla. 1997); see

[1] This Court granted appellant's Motion Requesting Judicial Notice of Prior Sentencing Order on April 19, 2000. The prior sentencing order is reproduced in full in the Appendix to the Initial Brief of Appellant, pages 18-28.

Way v. State, 25 Fla. L. Weekly S309, S313 (Fla. April 20, 2000). Because resentencing is an entirely new proceeding, the prior sentence, vacated by this Court, is a nullity and offers "no probative information on any of the aggravating or mitigating factors" weighed in the resentencing proceedings. Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986).

Second, Judge Beach was required "to make an independent determination" of the sentence to be imposed, Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988), based upon "a thoughtful, deliberate, and knowledgeable weighing ... of all aggravating and mitigating circumstances." Hernandez v. State, 621 So. 2d 1353, 1357 (Fla. 1993). Just as Judge Beach could not delegate this duty to the state, Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987), he could not properly rely on Judge Villanti's findings from a vacated sentencing order based upon evidence presented in an entirely different proceeding to make the requisite independent determination at resentencing.

Appellee seeks to minimize the consequences of Judge Beach's reliance on Judge Villanti's findings by arguing that Judge Beach did not rely upon any material unproven facts. Answer Brief, p. 7. Appellant disagrees. Even if every fact found by Judge Villanti had been proved again at the resentencing, copying Judge Villanti's findings would violate Judge Beach's duty to independently, thoughtfully, deliberately, and knowledgeably weigh the aggravating and mitigating circumstances. In any event, by copying Judge

Villanti's findings, Judge Beach found as facts matters which were not proved during the resentencing proceedings.

In support of the CCP aggravating circumstance, Judge Beach copied Judge Villanti's findings that Morton "solicited suggestions of what proof would be needed to establish the murder -- such as a human body part as a trophy;" that Morton had "extra ammunition;" and Morton "expressed a hope that the killing would produce a rush ...." [I 153, 154, 156; A 9, 10, 12, 19, 20, 22, 23] None of these "facts" were proved in the resentencing proceedings. Appellee relies upon proof of different facts at resentencing, or evidence not admitted at resentencing, to support the erroneous findings. Answer Brief, p. 8-10.

Appellee claims that Judge Beach "probably gleaned" that Morton had extra ammunition "from an exhibit which was marked and identified -- but not admitted -- prior to the resentencing proceeding." Answer Brief, p. 8. Appellee's assertion is nothing but speculation. Moreover, if appellee is correct, Judge Beach violated Morton's basic constitutional right to due process of law by basing his death sentence on evidence not admitted in court without giving the Morton notice and an opportunity to rebut it. Gardner v. Florida, 430 U.S. 349 (1977); Porter v. State, 400 So. 2d 5, 7 (Fla. 1981). Appellee would seek to excuse the due process violation by asserting that Morton's carrying of extra ammunition was not a significant or contested fact below. Answer Brief, p. 9. The truth is that it was never proved that Morton carried extra

ammunition in the resentencing proceedings, so it was not a fact at all, and it could not be considered.

The state presented no evidence at resentencing that Morton "solicited suggestions of what proof would be needed to establish the murder -- such as a human body part as a trophy[.]" [I 153, 156; A 9, 12] Instead, the state proved that before the murders, Madden jokingly asked Morton to bring him back a finger, [IV 317] and Morton said he was going to kill some people and bring back a finger or a head. [IV 289-90] In fact, Garner, not Morton, cut off Mr. Bower's finger, [III 252; IV 294, 320] then Morton displayed the finger to Madden afterwards. [IV 283-84, 299-301]

More importantly, the state presented no evidence at resentencing that Morton "expressed a hope that the killing would produce a rush ...." [I 154, 156; A 10, 12] In a failed attempt to support this unproved circumstance, Answer Brief, p.9, Appellee relies on Angela Morton White's out-of-court statement, which the prosecutor read to White during his cross-examination, but which was never admitted into evidence,[2] [V 515-17] that Morton "was bragging about what he was going to do." [V 516] Appellee further relies upon the testimony of Victoria Fitch that Morton said that "he was going -- he wanted to kill someone." [IV 348] Appellee

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[2] White's own testimony at resentencing did not establish the facts asserted in the prior sworn statement. The prosecutor never requested that the prior statement be admitted into evidence. The prosecutor was not a witness and was not testifying under oath when he read the prior statement. "The law has long recognized that 'counsel is not under oath to speak the truth, nor called as a witness to give his opinion.'" Eure v. State, No. 2d99-1671, 2000 WL 1006038, slip op. at 3-4 (Fla. 2d DCA July 21, 2000) (quoting Tyson v. State, 87 Fla. 392, 394, 100 So. 2d 254, 255 (1924)).

further relies on Morton's statements made after the murders that "it was cool, there was blood and brains everywhere," [IV 308] and that "he did it for the fun of it." [IV 323] Finally, appellee relies on Whitcomb's testimony that when Morton told them about the murders, "He was excited, like it was funny." [IV 291] Obviously none of the evidence cited by appellee supports Judge Beach's finding that Morton hoped the killing would produce a rush.

Regarding the murder during the commission of or attempt to commit robbery and/or burglary aggravating circumstance, Judge Beach copied, with a minor change to correct the grammar, Judge Villanti's finding, "Although nothing other than the victim John Bower's finger was taken, ample evidence of ransacking to the contents of the dwelling, which was terminated when a car was heard outside, to demonstrate the foregoing factor; independent of the defendant's confession and statements to others on this issue." [I 154, 157; A 10, 13, 20, 23] In direct contravention of the finding, Appellee relies upon Morton's confession that he and his cohorts looked around for "anything" [III 249] to support this finding, while conceding that there was no evidence that the search ended when they heard a passing car. Answer Brief, p. 10. Appellee has not shown any evidence of "ransacking," much less evidence which was independent of Morton's confession and statements to others. The only other evidence relied upon by Judge Beach to support the finding of felony murder was that the finger was taken. As explained above, Gardner was the one who cut off Mr. Bower's finger. [III 252; IV 294, 320]

Regarding the mitigating circumstance of voluntary confession and cooperation of the defendant, Judge Beach copied verbatim Judge Villanti's finding that

> the Defendant's cooperation can only arguably come from his voluntary confession. Because this followed an extensive manhunt on two occasions before the Defendant was apprehended, the Court, although considering the foregoing a mitigating circumstance, gives it little weight in the decision process.

[I 160; A 16, 27] Appellee concedes that there was no evidence of the alleged extensive manhunts at the resentencing proceeding. Answer Brief, p 7. The other facts cited by Appellee, Answer Brief, p. 7-8, are irrelevant to this issue because they were not relied upon by Judge Beach. Just as Judge Beach could not delegate his duty to prepare the sentencing order to the state during the resentencing proceeding, Patterson v. State, 513 So. 2d at 1261, the state cannot retroactively perform Judge Beach's duty to determine what facts were relevant to the consideration of aggravating and mitigating circumstances.

Judge Beach's error in copying Judge Villanti's factual findings on aggravating and mitigating circumstances was not harmless. An error in the sentencing order in a capital case should be considered harmless only if there is no reasonable possibility that the error contributed to the sentence. See Zack v. State, 753 So. 2d 9, 20 (Fla. 2000); State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986); Answer Brief, p. 12. In this case, the court's error necessarily affected the sentence. The court's findings of fact in support of aggravating and mitigating

circumstances are the foundation upon which a death sentence is imposed. Because most of Judge Beach's factual findings are copied from Judge Villanti's factual findings with little regard for whether the evidence at resentencing supported them, this Court cannot be certain that Judge Beach performed his independent, non-delegable duty to engage in "a thoughtful, deliberate, and knowledgeable weighing ... of all aggravating and mitigating circumstances surrounding both the criminal and the crime, as dictated by the United States Supreme Court and our own constitution." Hernandez v. State, 621 So. 2d at 1357. To the contrary, the extent to which Judge Beach copied the prior sentencing order verbatim is a compelling indication that he did not independently perform that duty. Thus, Mortons's death sentence must be reversed.

ISSUE II

THE PROSECUTOR'S IMPROPER CLOSING ARGUMENTS VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

In Eure v. State, No. 2D99-1671, 2000 WL 1006038 (Fla. 2d DCA July 21, 2000), the Second District reversed convictions for sale and possession of cocaine on the ground that defense counsel was ineffective on the face of the record for failing to object to the prosecutor's closing argument. The Second District found that the argument was objectionable because it contained several fundamental flaws: (1) The prosecutor effectively made himself a witness for the prosecution by telling the jury that the defendant was a drug dealer. (2) The prosecutor improperly sought to buttress the officer's testimony by reference to matters outside the evidence by asking the jury to believe that the officer told the truth in his police reports and application for a search warrant. (3) The prosecutor misinstructed the jury on the law. (4) The prosecutor made an improper message to the community argument, aimed at the jurors' fears of a lawless community. The Second District concluded that "the prosecutor's remarks in his closing argument to the jury were impermissible comments that deprived the defendant of a fair trial ...." Slip op. at 5.

Counsel for appellant has not asserted ineffectiveness of Morton's trial counsel in this appeal because counsel does not want to compromise appellant's ability to raise ineffective assistance of counsel claims in future post-conviction proceedings if he loses the present appeal. See Blanco v. Wainwright, 507 So. 2d 1377,

1384 (Fla. 1987). While the Second District's reasoning in Eure would support reversal in Morton's case, counsel believes that the Second District's finding of ineffective assistance of counsel on the face of the record was unnecessary to its decision to reverse. Having found fundamental flaws in the prosecutor's argument which deprived Eure of his right to a fair trial, the Second District should have found fundamental error which need not be preserved by objection. This Court has defined fundamental error as error which is the "equivalent to a denial of due process." Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994); State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993). The right to a fair trial is a fundamental requirement of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution. Violation of the accused's right to a fair trial is a violation of due process of law and must be regarded as fundamental error.

The fundamental flaws in the prosecutor's argument in Eure are similar to the fundamental flaws in the prosecutor's closing argument at Morton's resentencing trial. First, by arguing as facts the contents of Angela Morton White's prior out-of-court statements which the prosecutor read to her during cross-examination,[3] [V 515-17; VII 712-13] and by arguing his opinion

[3] The prosecutor claimed that he was refreshing White's recollection, [V 515] but reading a prior statement to a witness in the presence of the jury is not the proper method to refresh recollection. Professor Ehrhardt has explained the proper method:

> When a witness testifies that he or she has no present recollection or memory of a

that Ms. Pisters, the social worker, was biased because she opposed capital punishment, [VII 727, 729] the prosecutor "effectively made himself a witness for the prosecution. The law has long recognized that 'counsel is not under oath to speak the truth, nor called as a witness to give his opinion.'" Eure, slip op. at 3-4 (quoting Tyson v. State, 87 Fla. 392, 394, 100 So. 2d 254, 255 (1924)). Second, because White's prior statements were never admitted into evidence,[4] the prosecutor was making "reference to matters outside the evidence." Eure, slip op. at 4. Third, by arguing that child abuse was not mitigating,[5] [VII 727] and that the people of the State of Florida have a right to a recommendation of death, [VII 746] the "prosecutor's argument amounted to a misinstruction on the law." Eure, slip op. at 4. Fourth, the argument that the people of the State of Florida have a right to a recommendation of death was also "an improper 'message to the community' argument, aimed at

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> fact, counsel may show the witness a writing or other object to attempt to refresh the witness' recollection. If, after seeing the document or object, the witness' memory is jogged so that the witness has a present recollection of the fact, the witness may testify to the fact from his or her present memory. However, if the witness does not have a present recollection of the fact, the witness may not testify to the fact.

Charles W. Ehrhardt, Florida Evidence § 613.1 (2000 ed.).

[4] See footnote 2, supra.

[5] Abuse suffered by the defendant as a child is a mitigating circumstance which must be considered. Penry v. Lynaugh, 492 U.S. 302, 322, 328 (1989). The fact that the abuse came to an end does not diminish the mitigating nature of child abuse suffered by the defendant during the formative years of his life. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

the jurors' most elemental fears of a lawless community that could endanger the jurors and their families." Eure, slip op. at 5.

These fundamental flaws in the prosecutor's closing argument "were impermissible comments that deprived the defendant of a fair trial," Eure, slip op. at 5, violated Morton's due process right to a fair trial under the United States and Florida Constitutions, and constituted fundamental error requiring reversal notwithstanding defense counsel's failure to object.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO FIND THAT MORTON'S ANTISOCIAL PERSONALITY DISORDER WAS A MITIGATING CIRCUMSTANCE.

Appellee devotes ten pages of his brief to arguing that an antisocial personality disorder is not mitigating. Answer Brief, p. 29-38. Appellee is wrong. This question was settled by the majority decision of the United States Supreme Court in Eddings v. Oklahoma, 455 U.S. 104 (1982). Eddings was a sixteen year old boy convicted of murder in the first degree and sentenced to death. At his sentencing hearing, Eddings presented mitigating evidence of his troubled youth and emotional disturbance, including testimony by a psychologist that Eddings had a sociopathic or antisocial personality. Id., at 107. Although the Oklahoma death penalty statute provided for the consideration of all mitigating circumstances, the trial court refused, as a matter of law, to "consider in mitigation the circumstances of Edding's unhappy upbringing and emotional disturbance," finding that Edding's youth was the only mitigating circumstance. Id., at 109. The Oklahoma Court of Criminal Appeals affirmed the death sentence, agreed that the only proper mitigating circumstance was Edding's youth, and expressly rejected Edding's personality disorder as a mitigating circumstance:

> There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State.

Id., at 109-110. The United States Supreme Court held that

> the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in [Lockett v. Ohio, 438 U.S. 586 (1978)]. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence.... Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.... In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant. [Footnote omitted.]

Id., at 113-115. The Supreme Court reversed and remanded, directing that "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." Id., at 117.

Thus, the Eddings decision mandates the consideration and weighing of evidence of an antisocial personality disorder when presented in mitigation by the defense. While the sentencer may decide to give the evidence little weight, the sentencer cannot refuse to consider or ignore the evidence and give it no weight.

The cases cited by appellee for the proposition that an antisocial personality disorder is not mitigating as a matter of law, Carter v. State, 576 So. 2d 1291, 1292-93 (Fla.), cert.

denied, 502 U.S. 879 (1989); Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988), cert. denied, 493 U.S. 1051 (1990); Weeks v. Jones, 26 F.3d 1030, 1035 n. 4 (11th Cir. 1994), are all incorrectly decided. Neither this Court nor the federal circuit courts have authority to overrule the decision of the United States Supreme Court in Eddings. Nor can Justice Thomas overrule Eddings by expressing his disagreement with that decision in his concurring opinion, not joined by any other justice, in Graham v. Collins, 506 U.S. 461, 478-500 (1993).

This Court must follow Eddings, reverse the death sentence, and remand for resentencing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Scott A. Browne, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of June, 2001.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

PAUL C. HELM
Assistant Public Defender
Florida Bar Number O229687
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/pch